

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARK EVILSIZOR</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,001,463
<b>BUTLER TRANSPORT</b>	)	
Respondent	)	
	)	
AND	)	
	)	
<b>FIREMAN'S FUND</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of a preliminary hearing Order Denying Medical Treatment entered by Administrative Law Judge Brad E. Avery on April 9, 2002.

**Issues**

The Administrative Law Judge (ALJ) determined that on December 4, 2001, claimant suffered personal injury by accident that arose out of and in the course of his employment with respondent. Preliminary Hearing benefits were denied, however, because claimant failed to prove that he gave notice to the respondent within 10 days of the alleged injury and failed to establish just cause for extending the 10-day notice period to 75 days.

The issue for review is whether respondent had timely notice of claimant's accident and, if not, whether just cause exists for extending the 10-day notice period to 75 days.

### **Findings of Fact and Conclusions of Law**

Having reviewed the evidentiary record compiled to date, the Appeals Board (Board) finds that the ALJ's Order should be reversed.

Claimant began working for respondent on November 6, 2001, as an over-the-road truck driver. Claimant was picking up a load in Laramie, Wyoming on December 4, 2001 when he stepped from his truck and slipped on some ice or packed snow and fell, injuring his knee. Claimant felt an immediate pain in the kneecap area and there was a popping sound when he stood up. Claimant said he mentioned his injury to the dispatcher that same day and told him if it got worse he would let him know.<sup>1</sup> At this point claimant thought the symptoms were temporary and would go away. Although the dispatcher is not a supervisor, it is not disputed that the dispatcher is authorized to receive notice of accidents. Later that same day, claimant called the night dispatcher and informed him that he was still having pain in his knee. Claimant did not ask for, nor was he offered medical treatment. Claimant had a previous torn medial meniscus that was surgically repaired in August 2001. Claimant said that this injury felt different.

Claimant returned to Kansas on December 9 and requested a 30-day leave of absence to attend to a family problem, which was granted on December 11, 2001. No mention was made of the work-related injury again until after claimant sought medical treatment on his own on Friday, December 21, 2001, with Dr. Kimball Stacey. Claimant described to Dr. Stacey a December 4, 2001 slip and fall injury to his right knee while working in Laramie, Wyoming. Claimant was given an off-work slip by Dr. Stacey which claimant faxed to respondent on Monday, December 24, 2001, along with another sheet with a note explaining that he tore the cartilage in his knee in Laramie, Wyoming on December 4, 2001.<sup>2</sup>

Claimant was instructed to stay in contact with respondent at least weekly during his leave of absence. Claimant called the respondent on December 19 or 20 and said he would be returning on December 26, but after he went to the doctor and was taken off-work, he faxed respondent the off-work slip instead. Nevertheless, on December 26, 2001, respondent sent claimant a letter informing him that his personal leave of absence had been rescinded. "On December 20, 2001 you stated you would be returning on December 26, 2001. As you failed to return as scheduled, and further, failed to telephone and

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<sup>1</sup> This communication was through an on-board computer and satellite communication system by which the drivers communicate with the dispatchers by electronic mail.

<sup>2</sup> Tr. of Prel. H., Claimant's Ex. 2 (April 4, 2002).

communicate such with the company your termination has been processed.”<sup>3</sup> Sometime during this period claimant applied for unemployment benefits.

Neither of the dispatchers claimant contacted on the accident date testified at the Preliminary Hearing. Mr. Jeffrey Dale Green, General Manager at Butler Transport, was the only other witness besides claimant to testify. Mr. Green acknowledged that claimant either called in or was called on December 18 and, again on December 20 to discuss the status of his leave of absence and the date he would return to work. Mr. Green said he first became aware of claimant’s work-related injury on December 26, 2001, when the Safety Director, Larry Biles, brought him a fax that had been received that morning. An investigation was done to determine whether anyone had previously received word of this injury and according to his information no one had.

Mr. Green explained the two-way text messaging system installed on respondent’s trucks that provides instantaneous communication between the drivers and the dispatchers. He said that he personally reviewed the transmissions and the night communication sheet for December 4, 2001 and saw no mention of claimant having suffered a work-related accident or injury. The e-mail transmissions are stored in the computer for 30 days before they are automatically deleted. Apparently, neither Mr. Green nor anyone else printed out or made a copy of the relevant transmission because Mr. Green testified at the time of the April 4, 2002 Preliminary Hearing that those records no longer existed. But Mr. Green pointed out that if any transmission had mentioned an accident or injury, that message would have been printed out at the time it was received and forwarded to Mr. Biles, the Safety Director. Mr. Green admitted that he did not speak to the night dispatcher personally about whether he received a telephone call from claimant, but he looked at the dispatcher’s communication sheet for that day and there was no record of a phone call from claimant on December 4. Mr. Green acknowledged that respondent’s telephone bill would reflect incoming calls made to the 800 number, he did not examine those bills. Finally, Mr. Green said the dispatch records indicated claimant picked up his load in Laramie, Wyoming on December 5, not December 4, 2001. Claimant was dispatched from Denver, Colorado to Laramie on December 4, 2001. So, although claimant may have arrived in Laramie on December 4, he was not loaded until the next day.

Respondent alleges the first notice claimant provided was the cover sheet that accompanied Dr. Stacey’s off-work slip which claimant faxed to respondent on December 24, 2001. This was beyond the 10-day notice period. Respondent contends claimant must therefore rely upon the provision in K.S.A. 44-520 that permits time for giving notice to be

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<sup>3</sup> Tr. of Prel. H., Respondent’s Ex. C (April 4, 2002).

extended to 75 days from the date of accident if claimant's failure to notify respondent within 10 days was due to just cause. In this instance, claimant's December 4, 2001, accident was a sudden and traumatic event which caused significant pain. There is no question but that claimant was aware he had injured his knee and that the injury was directly attributable to his employment. But just cause is not the issue. Claimant insists he gave notice of his accident and injury to a dispatcher within 10 days.

The ALJ apparently found claimant to be credible because he relied upon claimant's testimony to find claimant did suffer a work-related injury as alleged. The Board finds claimant's testimony that he gave timely notice of his accident and injury to his dispatcher to be credible as well.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.<sup>4</sup>

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order Denying Medical Treatment dated April 4, 2002, entered by Administrative Law Judge Brad E. Avery, should be and is hereby, reversed and this matter is remanded to the Administrative Law Judge for further orders consistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July 2002.

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BOARD MEMBER

c: Roger D. Fincher, Attorney Claimant  
Matthew J. Stretz, Attorney for Respondent and Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director

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<sup>4</sup> K.S.A. 44-534a(a)(2).